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SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 3.

UNITED STATES OF AMERICA, APPELLANT,
vs.
NORTHERN PACIFIC RAILWAY CO., ET ALS.,
APPELLEES.

No. 4.

NORTHERN PACIFIC RAILWAY CO., ET ALS.,
APPELLANTS,
vs.
UNITED STATES OF AMERICA, APPELLEE.

MOTION OF PETITIONER, NORTHERN PACIFIC RAILROAD CO., BY MINORITY STOCKHOLDERS, TO FILE ON RE-ARGUMENT OF THIS CAUSE A BRIEF MADE A PART OF THIS MOTION AND HERETOFORE DEPOSITED WITH THE CLERK.

THOMAS BOYLAN,
Philadelphia, Pa.,
ROBERT L. EDMISTON,
Spokane, Washington,
RAYMOND M. HUDSON,
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JUDD & DETWEILER, INC., PRINTERS

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OCTOBER TERM, 1940.

No. 3.

THE UNITED STATES OF AMERICA, APPELLANT,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, NORTHERN PACIFIC RAILROAD COMPANY, NORTHWESTERN IMPROVEMENT COMPANY, ET AL., APPELLEES.

No. 4.

NORTHERN PACIFIC RAILWAY COMPANY, NORTHERN PACIFIC RAILROAD COMPANY, ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA, APPELLEES.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

1. Now comes the petitioner, Northern Pacific Railroad Company by Charles E. Schmidt and other Minority Stockholders, which was defendant in a suit in equity instituted by the United States of America as plaintiff against Northern Pacific Railway Company, Northern Pacific Railroad Company, et al., defendants, in the Dis-

trict Court of the United States for the Eastern District of Washington, and respectfully represents and shows that the said cause in said District Court was instituted in pursuance of the Act of Congress of June 25, 1929, 46 Stat. 41, U. S. Code Title 43, Sections 921 to 929.

In said cause the District Court on March 9 and 22, 1938, struck from the record the answer and cross-bill of the Northern Pacific Railroad Company by Minority Stockholders, but the order provided as follows:

> "It is Further Ordered, that this Order shall be without prejudice to the right of said Charles E. Schmidt, George Landell, executor of E. A. Landell, deceased, Clarence Lobenthal, trustee of Bernard Lobenthal, and Walter L. Haehnlen, themselves or as representatives of other stockholders of said Northern Pacific Railroad Company, or of such other stockholders themselves to assert later in this cause, when the fund, if any, to be distributed by the United States, is established and fixed or in any other proceeding, any rights which they may have by reason of the matters and things alleged in said answer and cross-bill and in said intervening petition."

The petitioner thus has rights reserved that it wishes to protect and preserve, which involve some of the same questions to be considered on the re-argument; and the petitioner naturally wishes to present, and have considered by the Court the main general questions, the decision of which would seem necessarily to involve the decision of the validity of the foreclosure, if one, in 1875, the validity of the mortgages created thereafter, and the validity of the foreclosure, if one, in 1896.

The said cause is now in this court upon appeal from the Findings of Fact and Decree of June 27, 1931 (R., 639), by the United States of America, being No. 3, October Term, 1940, and by the Northern Pacific Railway Company, Northern Pacific Railroad Company, et al., being No. 4, October Term, 1940.

This petitioner, by minority stockholders, on the 12th day of February, 1940, moved this Court to permit counsel for this petitioner to appear at the argument on the appeals in said cause, and to present for decision of the Court the question of the rights of the Northern Pacific Railroad Company to the various land grants, railroad properties, and franchises, as hereinbefore mentioned. Objection to the participation in said argument by your petitioner's counsel was made by the United States of America and by the Northern Pacific Railway Company and this Court refused the motion of your petitioner for leave to participate in the argument of said appeal.

This petitioner printed, served and presented a Brief with said Motion in support of the claims of the Northern Pacific Railroad Company to the land grant as aforesaid, which it believes will be helpful to the court in the consideration of the main appeals on re-argument and in passing upon the rights of the Northern Pacific Railroad Company as heretofore mentioned, but the Motion failed to refer to the Brief or to request that the Brief be filed.

This petitioner is making this same Brief part of this Motion, and filing the necessary copies with same.

This petitioner sent copies of this Brief recently to Counsel for the Government and for the Railway Company, and the others, appellees, asking that they consent, or not object to the filing of the same. The Solicitor General wrote that he would not object (See his letter in Appendix). Counsel for the Railway Company, and others wrote that they would not consent to the filing of this Brief.

Argument upon said appeals was held before this Court on March 4 and 5, 1940. On June 3, 1940, this Court entered (310 U. S. 615, 84 L. Ed. 1006) the following Order:

"This cause is set for reargument October 14, 1940. The Court desires to hear argument limited to the purpose, scope and effect of the Act of June 25, 1929, the relief thereby afforded the parties, and the defenses made available to them; and to Appellant's Assignments of Errors 1-12, incl., 13 (insofar as it relates to failure to construct a line from Wallula, Washington, to Portland, Oregon), 19-27, inc., 29, 30, 32, 33, 36-40, inc., 42, 43, 52-54, inc., particularly with reference to the bearing of the matters comprehended in these Assignments upon the nature and extent of the relief accorded, and the defenses made available, to the parties respectively, by Secs. 1, 2, 5 and 6 of said Act."

This petitioner represents that the scope of the reargument thus ordered involves the rights of the Northern Pacific Railroad Company as affected by the alleged mortgage foreclosures of 1875 and 1896; it requires argument upon the questions as to the validity of the mortgages, and the sales of the property of the Northern Pacific Railroad Company, including the land grant, held in pursuance of the alleged foreclosures.

The petitioner at this point calls attention to the opinion of this Court in *United States* vs. *Northern Pacific Railway Co.*, 256 U. S. 51. This is known as the "Forest Reserve case". In the course of the opinion, Mr. Justice VanDevanter said (p. 58):

"The rights and obligations of the original railroad company arising out of the grant have long since passed to the present railway company and there is no need here to distinguish one company from the other."

That this was not a judicial determination of the question is easily gathered from the pleadings.

The Government's Bill averred in Paragraph III:

"That the said defendant, Northern Pacific Railway Company is the assignee and successor in

interest of the said Northern Pacific Railroad Company, of, in and to all properties, lands, rights, grants, privileges and franchises granted to the said Northern Pacific Railroad Company by the aforesaid Act of Congress approved July 2, 1864, and by all acts supplemental thereto and amendatory thereof."

The defendant Railway Co. filed an Answer to the Bill, Paragraph I, whereof is as follows:

"It is true that the defendant is a corporation and is the assignee and successor in interest of the Northern Pacific Railroad Company of, in and to all the properties, lands, rights, grants, privileges and franchises granted to the Northern Pacific Railroad Company by Act of Congress approved July 2, 1864, as alleged in the bill."

And Paragraph XI of the Answer averred:

"On the 15th day of October, 1896, the Northern Pacific Railroad Company duly sold and conveyed to this defendant all its right, title and interest in the lands granted by Congress, as well as its right to receive lands within the place limits thereof but excepted therefrom."

It is thus seen from the pleadings that the plaintiff and defendant agreed that the railway company had succeeded to all the rights of the railroad company; at no time in the case was any question raised as to the same; and Justice Van Devanter's statement, as above quoted, was simply an acceptance of the pleadings as agreed upon by the parties, and in no sense a decision on the point involved.

And of prime importance on this question is the fact that the *Northern Pacific Railroad Company was not a party,* and could not be bound ~~by~~ either by the parties to the suit, or by the Court in deciding the same.

Congress by the Act of July 1, 1898 (30 Stat. 620), refused to recognize the railway company as the lawful successor of the railroad company, stating it was a legal question to be decided by the Court. The applicable provision of the Act is as follows:

> "And provided further, that nothing herein contained shall be construed as intended or having the effect to recognize the Northern Pacific Railway Company as the lawful successor of the Northern Pacific Railroad Company in the ownership of the lands granted by the United States to the Northern Pacific Railroad Company, under and by virtue of foreclosure proceedings against said Northern Pacific Railroad Company in the Courts of the United States, but the legal question whether the said Northern Pacifc Railway Company is such lawful successor of the said Northern Pacific Railroad Company, should the question be raised, shall be determined wholly without reference to the provisions of this Act, and nothing in this Act shall be construed as enlarging the quantity of land which the said Northern Pacific Railroad Company is entitled to under the laws heretofore enacted."

Secretary of the Interior Work (Resolution 185 hearings, 3/1/24, part 2, page 9, 2/27/24) says that the Act of July 1, 1898, was extended by five acts.

Act of March 2, 1899, 30 Stat. 993 (Mt. Ranier Park Act).
Act of March 2, 1901, 31 Stat. 950.
Act of May 17, 1906, 34 Stat. 197.
Act of February 27, 1917, 39 Stat. 946.
Act of February 28, 1919, 40 Stat. 1204.

In the Mt. Ranier Park Act (30 Stat. 993) Congress required that the deed to the United States be executed by the railroad company and not the railway company in 1899.

This Act also provided that the railroad company could select lands in any State the railroad traversed in lieu of lands relinquished.

Attorney General Sargent (13 J. C. C. 5497) said that the Act of May 5, 1906, was an extension of the Act of July 1, 1898.

Further as to this point, Section 4 of the statute directing the present suit (the Act of June 25, 1929, 46 Stat. 41) is especially significant. It is as follows:

> "Sec. 4. The provisions of this Act shall not be construed as affecting the *present title* of the Northern Pacific Railroad Company, or its successors the Northern Pacific Railway Company, or any subsidiary of either or both, in the *right of way* of said road or lands actually used in good faith by the Northern Pacific Railway Company *in the operation of said road.*"

This enactment was eight years after the Forest Reserve case (256 U. S. 51), and while confined to the right of way or lands used in the operation of the road, it clearly indicates that Congress still regards the respective rights of the Railroad Company and the Railway Company as undetermined.

The provisions of the Joint Resolution of May 31, 1870, as to limiting the price per acre to $2.50, do not apply, as the mortgage of July 1, 1870, was never foreclosed, never released, and is still on the property. Some of the bonds were held by a trust company in New York, and the *railway company* carried some of the bonds as assets in its Report of June 30, 1898. In the balance sheet of the railroad company as of September 20, 1876, they were carried as assets.

The pertinent part of the Resolution is as follows:

> "PROVIDED That all lands hereby granted to said company which shall not be sold or disposed of or *remain subject to the mortgage by this Act authorized,* at the expiration of five years after the

completion of the entire road, shall be subject to settlement and pre-emption like other lands, at a price to be paid to said company not exceeding two dollars and fifty cents per acre."

The Government cannot claim that the price should be $2.50 per acre until it shows affirmatively that the mortgage of July 1, 1870, was foreclosed, or has been satisfied, and this it has not done. In fact, the Joint Congressional Committee hearings showed that it was not foreclosed or satisfied; and petitioner is inclined to believe that there is evidence in the present case that there was no foreclosure in 1875, and no satisfaction or release. In the 1875 suit in New York, where the Court had no jurisdiction, as none of the land was there, and the *United States was not a party,* the decree of sale, after being entered, was suspended by the Court, the suspension was not thereafter removed, and the decree was never executed.

The Government's "Definite Statement of Points" (R., 840) states:

> "These submissions are believed to comprehend, in outline, the *fifty-five* assignments of error for the United States (R., 651), and to be comprehended by those assignments; *but in view of the mandates to the Attorney General* in the Act of June 25, 1929, c. 41, 46 Stat. 41, it would be inappropriate for the Attorney General *to waive any of the assignments of error and no such waiver is made;* but it is believed that the above comprehensive simplification will render it unnecessary for the court to deal specifically with the separate assignments." (Italics supplied.)

The Government filed certain objections to the Findings of Fact and Conclusions of Law of the District Court with the decree of June 27, 1939, in which it was stated (R., 593):

"Plaintiff objects to findings (c), (d), (e), and (f) in Sub-division I, 'General Findings and Conclusions', all relating to certain mortgages and foreclosure proceedings in connection therewith, and as grounds for such objection says:

"'(a) That the Court is without authority to make findings in respect thereto for the reason that the portions of the Amended Bill of Complaint which alleged certain facts with respect to said mortgages and the foreclosure thereof were stricken from the bill by the order of the Court of October 3, 1935, as amended by the order of January 29, 1936, and *no issue with respect to such matters was tried upon the facts.*'" (Italics supplied.)

The Government's Assignments of Error 31 (R., 655) and 51 (R., 657) are as follows:

"The District Court erred:

"31. In holding that the mortgages thus foreclosed were duly executed under authority conferred by the Joint Resolution of May 31, 1870."

"51. In overruling the plaintiff's objections to the court's propsed findings and conclusions, the ruling as to each objection constituting a separate error."

The railway company for many years contended and pleaded in different suits that there was a valid and actual foreclosure in 1875; but in 1924 or 1925 officials of the railway company switched completely around, and contended that there was no foreclosure of any kind, character or description in 1875; that no title, right or interest in and to the property, assets and lands of the railroad company,—the Federal corporation—had passed from it in 1875, and claimed that the entire proceeding in 1875 was merely an exchange of securities.

The Court will note that in this suit there were no Findings of Fact and Conclusions of Law as to the so-called 1875 foreclosure.

Finding (c) sustained the validity of all the mortgages after the mortgage of July 1, 1870 (R., 603).

Findings (d), (e), (f) (R., 604-5) sustain the validity of the foreclosure of 1896, and the sales, and decrees thereunder, as well as private deeds between the railroad and the railway, which deeds the railroad did not have the power to execute. Conclusion (b) sustains said foreclosure and sales (R., 605), Conclusion (a) sustains the mortgages which were foreclosed (R., 605). The decree of June 27, 1939, Par. III (R., 640) sustained the mortgage of July 1, 1870, and all the mortgages thereafter, and the foreclosure of 1896.

Petitioner's Brief, made part hereof, which the Court is requested to receive and consider on the re-argument, discusses the law, showing that the mortgage of July 1, 1870, is the only mortgage that railroad company had the power and authority to execute—it was never foreclosed or satisfied—that all the remaining mortgages were beyond the power of the railroad company to execute and were therefore invalid; that there was no foreclosure in 1875, that the Court did not have jurisdiction of the land or the railroad to, and the United States was not a party; that the so-called foreclosure of 1896, like the so-called foreclosure of 1875, was merely an exchange of securities, and not a foreclosure; in addition to which the Court did not have jurisdiction of the *res* and the United States was not a party, although it was a necessary party to a foreclosure; and that the *railroad* did not have power to give or pass and the *railway* did not have power to receive title to the railroad properties as claimed by the railway company.

As stated in the quotation from the Government's objections above "no issue with respect to such matters was tried upon the facts", notwithstanding, as a matter of law, the Findings and Conclusions are erroneous.

The mandate of the Act of 1929 does not require that the Court "consider, make findings relating to, and determine" without evidence on the foregoing matters; the clear intent is that there should be evidence.

The railway company's attorneys on January 18, 1932 (R., 252), filed a disclaimer of the railroad company which it was holding in captivity, as follows:

> "Defendant Northern Pacific Railroad Company, a corporation, organized and existing under the provisions of the Act of July 2, 1864 (13 Stat. 365), says that it does not claim or pretend to have any right, title, or interest in the subject matter of this suit as set forth in the original bill of complaint as amended, or any part thereof, and this defendant disclaims any right, title, or interest in said subject matter and every part thereof.
>
> Wherefore this defendant prays that the original bill of complaint as amended be dismissed as to it."

On May 9, 1932, the railway company attorneys likewise filed an Answer for the Railroad Company, as follows (R., 254):

> "Now comes the defendant Northern Pacific Railroad Company, a corporation, and for its answer to the bill of complaint, says.
>
> It admits that it is a federal corporation, organized and existing under the provisions of the Act of July 2, 1864 (13 Stat. 365), and has an office in the City of New York. Denies that it is engaged in business.
>
> Defendant abides by, adopts, and makes a part of this answer the amended and supplemental answer filed herein by defendant Northern Pacific Railway Company."

In the oral argument of these appeals last March Mr. Davis, arguing for the railway company, stated:

"What Congress is seeking in the Act of 1929 was to carry into that Act, in effect, all the complaints that had been made before the Joint Congressional Committee."

All the matters and complaints which are discussed in the accompanying brief of the petitioner were brought up in the Congressional investigation and due complaint thereof made.

The petitioner adopts as part of this motion the statements in its motion heretofore filed in this case on February 12, 1940.

The petitioner represents that in view of acquiescence of the Government in the filing of petitioner's Brief, it will be important on the re-argument of these appeals that the petitioner's printed Brief be before the Court, and petitioner therefore moves for leave to file the same.

Respectfully submitted,

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ROBERT L. EDMISTON,
Spokane, Washington,
RAYMOND M. HUDSON,
MINOR HUDSON,
GEOFFREY CREYKE, JR.,
Washington, D. C.,
Attorneys for Petitioner.

October 7, 1940.

APPENDIX

Office of the Solicitor General
Washington, D. C.

August 26, 1940.

Raymond M. Hudson, Esq.
404-8 Peoples Life Insurance Building
1343 H Street, N. W.
Washington, D. C.

In re: Nos. 3 and 4. United States *v.* Northern Pacific Ry. et al.

Dear Sir:

In reply to your letter of August 23, I have no objection to your filing in the Supreme Court a "brief on behalf of minority stockholders of Northern Pacific Railroad Company on hearing on merits".

Very truly yours,

FRANCIS BIDDLE,
Solicitor General.